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STATE DOCUMENTS

Montana Constitutional Revision

I
Sketch of
Montana Constitutional History
1864-1889

II
Constitutional Revision

III
Constitutional Convention

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Issues for a
Constitutional Convention

Cooperative Extension Service
Montana State University, Bozeman

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I

A SKETCH OF MONTANA'S CONSTITUTIONAL HISTORY

1864-1889

THE TERRITORIAL FRAMEWORK

The Territory of Montana was created by Congress on May 1, 1864, in response to requests from Bannack and Virginia City residents. They contended that Montana's growing population in the mining camps could not be governed properly from Lewiston, the capital of Idaho Territory, which had been formed in 1863 from parts of Washington and Dakota territories.

For the next 25 years, Montana remained a territory, a governmental status designed to be transitional, a stepping stone to statehood. In Montana, this period was marked by repeated requests for admission into the Union. However, these requests went forth to Congresses that preferred to await significant population growth in the West before they accepted any changes in the national political balance. There was also little inclination in Washington D.C. to disturb a system which provided significant patronage opportunities.

The Organic Act

The Organic Act enacted by Congress in 1864 set forth the constitutional framework for the Territory of Montana. Specific amendments were added in 1867, and through the years Congressional acts common to all the territories and acts relating specifically to Montana modified both structure and power of the departments of the territorial government.

Administration of Territorial Montana

A combination of elected and appointed officials formed policy and administered the affairs of territorial Montana.

The President of the United States appointed the governor, secretary and Supreme Court justices to four-year terms. The President also appointed a United States attorney, a marshal and a surveyor-general to serve in Montana Territory. Montanans elected members of a two-house legislature and also elected a delegate to the U. S. House of Representatives, who could not vote, but who could debate in the House and serve on its committees.

Legislative Body

The Organic Act originally provided for a state legislature which would meet annually in 40-day sessions. The upper house, the Council, was initially assigned a membership of seven, who were elected for two-year terms, and a membership of 13 in the House of Representatives who were elected for one-year terms. The Organic Act then authorized the Legislative Assembly to increase the Council's membership to 13 and the lower house's to 26, but in 1878 an act of Congress limited territorial councils to 12 members, and lower house membership to 24. Both legislative houses were apportioned according to population. In 1868 Congress stipulated that territorial legislatures were to meet biennially, and an act of 1869 provided that members of both houses should be elected for terms of two years. Legislative sessions in all of the territories were limited to 40 days by an act of 1873, but this limitation was extended to 60 days in 1880. The legislature had extensive law-making powers, limited only by the veto of the appointed governor (which could be overridden), by specific statutory instructions from Congress, and by the right of Congress to annul territorial legislative acts. That power was infrequently used, but Montana felt its full force in the midst of a partisan storm in 1866-67 and, as a result, the acts of the two sessions of 1866 were annulled.

Court Systems

From 1864 to 1886 the territorial Supreme Court consisted of a chief justice and two associate justices. These justices also presided over the three judicial districts into which Montana was divided. In 1886 Congress altered the Montana system, providing for a Supreme Court consisting of a chief justice and three associate justices. The territory was then divided into four judicial districts. The Organic Act also provided for probate courts and for justice of the peace courts.

By proclamation of Acting Governor Thomas F. Meagher, in the midst of a constitutional and political impasse, Montana's first constitutional convention was assembled in April, 1866. Under terms of the Organic Act which created the Montana Territory, the governor set the apportionment, the time of elections, and the place and time of convening the first territorial legislature. Thereafter, these matters were to be determined by law, but Governor Sidney Edgerton, the first territorial governor, vetoed the first territorial legislature's apportionment act, and his veto was not overridden. Therefore, when Meagher was appointed acting-governor in the summer of 1865 there was no valid apportionment of the legislature. At first Meagher accepted advice that new enabling legislation was needed from Congress before the second legislative assembly could be convened. It was at this time that he proclaimed a constitutional convention to meet in Helena, instead of Virginia City (then the territorial capital), to fill the vacuum and provide a forum for discussion of territorial problems. Meagher also convened the legislature, which met in Virginia City from March 5 to April 14, 1866. Four of its 20 members were also delegates to the convention.

In summoning the convention, which some critics consistently denounced as a political maneuver, Meagher asked for the election of ten delegates each from Madison, Edgerton (later Lewis and Clark), and Deer Lodge counties, and five delegates each from Beaverhead, Gallatin, Jefferson, Missoula and Chouteau counties: a total of 55. There was, however, great difficulty in assembling a quorum and the convention was forced to resort to proxy voting in order to commence its deliberations. There were no funds appropriated for its work.

Drafting Constitution

Robert C. Ewing of Edgerton County was elected presiding officer and H. N. Maguire, also of Edgerton, secretary. A committee was named on the second day to draft a constitution. It did its work in rapid time, reporting back on the fourth day with a constitution (according to press accounts) patterned after the proposed Colorado constitution, with modifications borrowed from New York and California. On the fifth day, the convention accepted the proposed constitution, and on the sixth day the convention adjourned, instructing Maguire to have the constitution and proceedings printed in pamphlet form.

Historians have always been hard-pressed to carry the story of the 1866 convention beyond its adjournment. No money was available for printing the proposed constitution, nor has any evidence yet been found that it was printed or voted upon by the people or sent to Congress. The traditional account has been that one of the convention delegates, Thomas E. Tutt of Edgerton County, took the document off to St. Louis for printing and that it was lost in the process. Maguire went on to a career in newspapering in the territory, and there is also conjecture that the constitution of 1866 might have gone up in flames when a fire destroyed his papers in 1872.

Although there were no immediate results of the 1866 convention, it did focus concern for statehood at a very early point in the territory's development. Montana remained more persistent than any of its neighboring territories in seeking enabling legislation from Congress to call a new convention, and the Montana Legislature acted on its own initiative in assembling the convention of 1884. In its ranks were three men who had gained their constitution-writing experience in 1866, and who remain links in Montana's constitutional history. They are Washington J. McCormick, who represented Deer Lodge County in 1866 and Missoula County in 1884, when he served as temporary chairman of the convention; Elihu B. Waterbury, an Edgerton County delegate in 1866 and a representative of Deer Lodge County in 1884; and W. Y. Pemberton, who represented Edgerton County in 1866 and Silver Bow County in 1884.

CONVENTION OF 1884

The Montana territorial legislature periodically memorialized Congress for enabling legislation for a constitutional convention in the years between 1866 and 1883, but these memorials met no favorable response. The Legislative Assembly moved alone in January, 1883, and by resolution called for a constitutional convention to meet in January, 1884. A special election was conducted in November, 1883, to elect 45 delegates. Six of these represented the three judicial districts into which the territory was divided and 39 represented the territory's 13 counties.

Officers

The constitutional convention of 1884 met in Helena for

27 days, from January 14 to February 9. W. A. Clark, then firmly established in territorial banking and mining enterprises and a delegate from Silver Bow County, was elected chairman (a position he would again hold in 1889) and P. L. Van Cleve of Yellowstone County was selected convention secretary.

Delegates

Convention ranks included several men with experience as legislators or as executive officers in territorial government. Among them were Cornelius Hedges, longtime superintendent of schools; James H. Mills, newspaper editor and onetime territorial secretary; James E. Callaway, lawyer and former territorial secretary, and legislative veterans such as James Fergus, W. J. McCormick and E. B. Waterbury. There were the mining captains like Clark and Marcus Daly and the steamboating entrepreneur and future U. S. Senator T. C. Power. Joseph K. Toole, who would later serve as territorial delegate and first (and three-term) governor of the state, was a prime mover of the convention, as were several other lawyers, among whom were W. W. Dixon, W. H. Hunt, and A. F. Burleigh. Mercantile interests were represented by such men as Walter Cooper of Gallatin County and R. A. Eddy of Missoula County.

Convention Proceedings

The convention was divided into 22 standing committees, concerned chiefly with drafting the various substative areas of the proposed constitution. After some debate it was decided that the best course would be for each standing committee to consider pertinent sections of other state constitutions and to act on any resolution or proposition referred to it by the convention. Committee membership varied from three to nine members, with the three largest committees assigned to draft articles on the judiciary, state finances and mining, water and water rights. The committees were appointed on the fourth day of the convention and began to return reports for debate to the Committee of the Whole and for formal action by the convention on the ninth day. The completed draft was signed February 9, 1884, and an accompanying ordinance specified that Montana voters would vote for ratification or rejection at the November, 1884 general election. Meantime "An Address to the Voters of the Territory of Montana" was circulated to set forth the salient points of the proposed constitution. Montana voters approved the document by a vote of 15,506 - 4,266, but Congress continued to delay admission of

western territories until 1889.

Structure of Government

Although their efforts were apparently frustrated, the framers of the 1884 constitution occupy a significant place in Montana's constitutional history. An analysis of the 1889 constitution indicates that an overwhelming proportion (an estimated 90 percent of the text) of the constitutional articles framed in 1884 were carried over, approved, and incorporated in the 1889 constitution, and remain the substance of Montana's fundamental law to this day.

In the 1884 convention, Montana's plural executive was established. The Supreme Court was established as a separate court, with its elected membership distinct from the judges who presided over the district courts. Notably, the legislative article in the 1884 constitution posed more numerous restrictions on the legislature than had the territorial system. Except for an initial session of 60 days, the legislative assembly was to meet for 40-day biennial sessions. Both houses of the legislature were to be apportioned according to population. And the legislative article, replete with rules of procedure and restrictions, was cast in terms almost identical to those adopted in 1889. Other distinctive features of the 1884 constitution (altered in 1889) included the provision of two-year terms for the executive officers, an elective board of regents, and a system of county courts.

Other Constitutional Provisions

The historic battle ending in constitutional restriction of the taxation on mines only to the value of surface improvements and net proceeds was waged in 1884. Woman suffrage was suggested, but considered in committee as unwise; however, the legislature was authorized to extend to women the privilege of voting in school elections and of holding school offices. Extended debate and detailed constitutional provisions governed issuance of free passes to public officers by railroads and other transportation companies, and detailed constitutional regulation of corporations also were spelled out in 1884. The 1884 framers firmly committed Montana to the maintenance of a system of free public schools, with admission to all between the ages of five and twenty-one years. Three-months school was the minimum allowed to any school district in the state and careful provision was made for the

management of income and interest derived from school lands.

Amendment Provisions

The 1884 constitution provided for future changes to be made by convention or single amendments. There was no limit on the number of amendments that could be proposed by the legislature (the three amendment per election limit was added in 1889) and it took a majority vote, not a two-thirds as now required, for the legislature to propose either amendments or a convention.

CONVENTION OF 1889

Congressional deadlock and delay over admitting western territories as states gave way after the election of 1888. As a result, an Omnibus Act of February 22, 1889, permitted North Dakota, South Dakota, Washington, and Montana to commence the process leading to statehood.

Congressional Stipulations

Under terms of the enabling legislation, a convention of 75 delegates was to be selected at a special Montana election on May 7, 1889. The convention was then to assemble in Helena on July 4 to form a constitution as the main step toward full admission into the Union. Certain stipulations were included: the constitution of the United States was to be adopted and the state constitution was to be republican in form; there was to be no distinction in civil or political rights on account of race or color ("except as to Indians not taxed") and the new constitution was not to be "repugnant to the constitution of the United States and the principles of the Declaration of Independence."

Specifically, the Enabling Act provided that religious freedom had to be secured and a system of public schools provided. Other sections of the Enabling Act made available the land grants that Montana as a territory had not been eligible to receive and use for school, university and college purposes, and additional grants were provided for construction of public buildings and institutions.

Montana's population had grown from 39,159 in 1880 to about 142,000 in 1890. The railroads had been completed and the range livestock industry had brought population to the eastern plains. Counties had increased from 13 in 1884 to 21 in 1889. In population these counties ranged from Dawson with 2,000 people, to Silver Bow with a population of 48,000. Reconciliation between the divergent population of counties and between the divergent economies of the miningcounties in the west and the plains counties in the east was to be the crucial test of the convention's ability to compromise. Compromise ultimately came, however, in the plans for legislative apportionment by applying the federal principle to county representation in the state Senate which provides for one senator from each county. Also, in carrying over the mines tax exemption from territorial law and provisions of the 1884 constitution.

Delegates

The 1889 convention assembled at the new Court House in Helena, July 4, 1889. Seven members of the 1884 convention were returned to this convention and again they played principal roles in its deliberations. They were William A. Clark, who again was elected to preside, Joseph K. Toole, Walter Cooper, James E. Callaway, Timothy E. Collins, W. W. Dixon, and George O. Eaton. Among those who joined them in 1889 were other men prominent in territorial government, including Hiram Knowles, who had been Chief Justice of the territorial Supreme Court; B. Platt Carpenter, former territorial governor, and Martin Maginnis, who had been a highly successful territorial delegate to Congress from Montana. Among other delegates in 1889 who took active roles in debate and in committee work were John R. Toole, Conrad Kohrs, George W. Stapleton, Louis Rotwitt, John C. Robinson, John E. Rickards (later governor), William Parberry, Charles S. Marshall, Llewellyn Luce, Richard Hickman, Lewis Hershfield, Arthur Craven, William A. Chessman, Edward Cardwell, Charles H. Louis, Alfred Meyers, Peter Breen, and Charles S. Hartman (later Congressman from Montana).

An analysis of the convention's membership has shown that more than half of the members were associated with mining in an economic way--either directly engaged in the operation of mines or in holding considerable mining stock, or by dealing in mining law. Forty-six delegates had served in a legislature or had experience on the bench or in municipal government. Lawyers were in the majority with 23 delegates, and there were nine representatives of the range industry.

Use of 1884 Constitution

The 1889 convention was divided into 23 standing committees, with the procedure of 1884 repeated, i.e., resolutions and propositions were assigned to the appropriate committees, who reported back to the convention for action in the Committee of the Whole and in formal session. Basic to committee considerations were provisions of the 1884 constitution and pertinent sections from other state constitutions, especially those recently enacted in the West. As noted, the great majority of the provisions of the 1884 constitution were reported back to the 1889 convention verbatim. However, debate was not thereby reduced--as indicated by the 800,000 words in the published Proceedings and Debates.[1]

Constitution as "Fundamental Law"

Although convention delegates in 1889 well knew the theory of fundamental law and the desirability of keeping legislation out of the constitution, almost to a man they argued for an exception when a matter of particular interest or importance to them was being considered. John W. Smurr has noted: "The men of 1889 thought that the prime duty of a constitution was to reduce every contingency of life to a proposition at law," and that while "the other fellow's resolution was unnecessary, long-winded, legislative, and superfluous; one's own was a vital addition to the organic law, and to leave it out was to incite the legislature to every kind of excess."

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[1]The 1911 Legislative Assembly of the State of Montana authorized publication of the debates and proceedings of the Convention of 1889 and the 1919 Legislative Assembly appropriated funds for that purpose. The Proceedings were published in 1921 and include a detailed record of the transactions of the convention. There are available two studies of the constitutional convention of 1889 that were written as Master's theses at the University of Montana: John W. Smurr, "A Critical Study of the Montana Constitutional Convention of 1889" (1951), and Brian E. Cockhill, "An Economic Analysis of Montana's Constitution" (1968). Of the Montana histories, the most detailed treatment given the convention is by James M. Hamilton, From Wilderness to Statehood (Portland: Binfords and Mort, 1957).

Ratification

Although there was a tendency to leave such controversial issues as settlement of the site of the state capitol to the end of the session (that issue was ultimately settled by referring the decision to a vote in 1892), what was a generally harmonious convention concluded its labors and signed the constitution August 17, 1889.

The Enabling Act provided for an election October 1 on the constitution and also authorized election of state and county officers, legislators and congressmen, who would commence their duties if and when the state was admitted. Voters ratified the constitution by a vote of 26,950 to 2,274, and President Benjamin Harrison proclaimed Montana to be the Union's 41st state November 8, 1889.

PERTINENT STATISTICS

	1889	1970
Population of state	142,224	682,133,000
Number of municipalities	19	126
Number of counties	21	56
Number of state agencies	38	161
Annual state budget	$187,000	$250,000,000
Rural population	65%	40%
Urban population	35%	60%
Population of various cities:		
Helena	13,834	22,557
Billings	836	60,549
Great Falls	3,979	58,761
Missoula	956	29,232
Butte	10,723	23,762
Kalispell	(Not Available)	10,151
Bozeman	2,143	13,361

II

CONSTITUTIONAL REVISION

PURPOSE OF CONSTITUTIONAL REVISION

In 1816 Thomas Jefferson wrote to a friend:

> I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change in circumstances, institutions must advance also, and keep pace with the times.

The Declaration of Rights in the Montana Constitution states that "the people of the state have the sole and exclusive right. . . to alter their constitution. . . whenever they deem it necessary." The delegates who wrote the present constitution recognized the possibility of a need for comprehensive revision and provided for calling a constitutional convention. They also observed in "An Address to the People" that the people, when required, may be safely relied upon to correct constitutional inequalities and to provide new safeguards.

Referendum 67

By a two-thirds vote in both houses the Montana Legislature has submitted the question about calling a constitutional convention to "revise, alter, or amend the constitution of Montana" to the voters. The people will vote on Referendum 67 this November. Only the people can vote to call a convention. . .Only the people can approve or reject proposals of the convention to revise, alter or amend the constitution.

Montana has greatly changed in the 81 years since its constitution was adopted. The test of the effectiveness of our constitution, however, is not its age, but how well the government, it creates, functions. Unfortunately, because the state constitution is an obscure document to most citizens, they cannot evaluate how well it functions. Many states, including our neighbors of Idaho, North Dakota, and Oregon, have recently taken steps to modernize their aging constitutions to improve state and local government. The same opportunity is now presented to Montanans. Each person has a responsibility to himself, his children, and his fellow citizens to vote wisely on this question. This individual responsibility should prompt an examination of the document and a consideration of how needed changes may be accomplished.

Modernizing the Montana Constitution through a constitutional convention involves several steps, two of which have already been taken:

1. The Montana Legislative Council and the Montana Constitution Revision Commission studied the constitution and agree that it needs substantial revision and improvement.

2. The Montana Legislative Assembly decided by a two-thirds vote to submit the Referendum 67 to call a constitutional convention to the vote of the people in November, 1970.

There are five more steps that lie ahead and at each one the decision to move forward must be made by the people.

3. The people will vote in November on Referendum 67 to call a constitutional convention.

4. If the convention referendum is approved, the next legislature will set the date for election of delegates by the people, the date and length of the convention, and the salary of the delegates.

5. The people elect delegates to the convention.

6. The convention meets and may propose revisions, alterations, or amendments to the constitution.

7. The people vote to approve or reject the proposals of the constitutional convention.

Constitutional Convention Referendum

It is very important that Montanans understand Referendum 67. It is the most important issue the voters will consider this fall.

In order for voters to determine whether to vote for convening a constitutional convention, it is necessary to answer two basic questions:

1. Is it necessary or desirable that the Montana Constitution of 1889 be reviewed by a constitutional convention?

2. If it be concluded that a review and revision is desirable, is a constitutional convention the best means of amending the Montana Constitution at this time?

In answering these questions, it is neither necessary nor proper to propose specific amendments. The only issue before the electorate in November, 1970 is whether a constitutional convention shall be convened. By its nature, a convention is a deliberative body, a study group in the public eye, with an ancillary effect of educating and informing the electorate with the assistance of the news media. The proposals of the convention must be submitted to the electorate for approval or rejection. On its face, the convention can yield only advantage - a desirable check-up and audit of the state and local government machinery after over 80 years without such an examination.

Why a Convention?

The Montana Constitution Revision Commission recommends that a constitutional convention is the most feasible and desirable method of accomplishing comprehensive constitutional revision in Montana.

There are a number of reasons why it is preferable to review and amend the 1889 constitution by means of a constitutional convention instead of the alternative amendment method:

1. The constitutional convention is a means which is available at this time. The Montana Legislative Assembly by a two-thirds vote in both houses provided for the submission of

the convention referendum--Referendum 67. Approval of the convention referendum would direct the Forty-Second Legislative Assembly to call a convention to revise, alter, or amend the constitution of Montana.

2. A convention is called by the PEOPLE, delegates are elected by the PEOPLE, and its proposals are approved or rejected by the PEOPLE. The convention would be representative of the people of Montana. The delegates would be elected from house of representative districts on the basis of the new apportionment of seats to be determined after the 1970 census by the Forty-Second Legislative Assembly. Each delegate would have to be at least 24 years old, a citizen of the United States, and a resident for one year in the county or district from which elected. The convention can be expected to attract competent delegates. The experience of other states shows that most delegates are public-spirited citizens interested in the state's welfare, usually civic leaders who are well known and respected in their communities. Partisan pressurss are slight, as the delegates do not have to seek re-election. The atmosphere of a convention encourages constructive debate and action.

3. The entire constitution should be reviewed in the course of the amending process. There is a great deal of interplay among the various articles of the Constitution; and single legislative amendments that simply propose to amend one article or section may well create an inconsistency which would not exist in an overall review of the Constitution. The entire document should be looked at as one piece to eliminate discrepancies and conflicts. Furthermore, some amendments may seem so technical and prosaic that public interest could never be aroused in them as individual propositions, and yet they are necessary to our welfare. A convention can muster interest and support in the improvement of these working details which enable our government to function.

4. A constitutional convention will render all provisions subject to the spotlight of press and public and thereby minimize the chances of "special interest" provisions surviving. The convention will be constantly subject to public audit through news reports of its proceedings. In addition, the fact that the Convention will be a representative group will prevent domination by any small group.

5. A convention would increase citizen understanding of our

government. A significant by-product of the convention would be the opportunity for all people of Montana to focus on the constitutional foundation of our state. Almost a century has passed since the 1889 constitutional convention. The Commission agrees with the founders of our state that "The people of the state have the sole and exclusive right of governing themselves. . .and to alter. . .their constitution and form of government, whenever they may deem it necessary. . .(Montana Constitution, Article III, Section 2). This right in the Montana Bill of Rights can be given meaning for and by this generation through the process of a constitutional convention.

Why Not Single Amendments?

Since the Montana constitution was adopted in 1889, the only method used to change that document has been amendment process. Amendments initiated in the Legislature are traditionally limited and technical in nature. As a result changes in the Montana constitution have been narrow in scope and have not changed the fundamental principles of the Montana constitution.

Single amendments, provided for in Article XIX, Section 9, may be proposed in either house of the Legislative Assembly and if a proposed amendment receives a two-thirds majority vote in each house, it is placed on the ballot at the next general election. Not more than three amendments may be submitted at each election and ratification requires a majority of these voting on the amendment. When ratified, an amendment is incorporated in the constitution, either, replacing the section reprealed or adding a new section. There are problems with the single amendment approach:

1. Thirty-four single "piecemeal" amendments since 1889 have not kept the Montana constitution up to date. The number of amendments proposed has increased sharply since Montana's legislative reapportionment of 1965, averaging 30 in each of the last three legislative sessions. Only five state constitutions dating from the 19th century have been amended fewer times than the Montana document.

2. The three-amendment limitation restricts the number of amendments that may be placed on the ballot. This

probably works to defeat more amendments in the legislature than necessary because legislators vote against an amendment they are otherwise in favor of to advance one of greater preference. Only six other states have a limitation similar to Montana's and three of these have restrictions less stringent than the three-amendment limit in Montana.

3. Legislative and public opinion are not oriented toward comprehensive amendments. However, comprehensive amendments, as long as they are within the single-purpose requirement of the constitution, are permissible in Montana. In addition, a comprehensive amendment may affect scattered provisions of the constitution and it is difficult to draft such amendments. Complete revision of a constitution through comprehensive amendments would probably take several legislative sessions and it has proved to be difficult in other states to sustain momentum and public support of amendments over a number of years.

4. Voters have rejected recent fundamental amendments. New doubts over the feasibility of the amendment route for constitutional revision were raised in 1968 by the defeat of three amendments, primarily because these amendments encompassed changes more fundamental in nature than most proposed amendments.

5. Members of the legislature are not chosen for their views on proposed constitutional changes and the people do not give them a direct mandate in this direction. Legislators are understandably preoccupied with legislative matters and have insufficient time to study the issue in constitutional proposals. In addition, the legislature can hardly be expected to give objective consideration to constitutional proposals that affect its own structure.

6. Voter participation on amendments is low. Since 1950, Montana voters have accepted approximately 75% of the amendments that reach the ballot--five percent higher than the national average. But even so, actual voter participation on amendments is low. Approximately one-fourth of the people who vote in elections do not vote on proposed amendments. It is believed one of the reasons for this fact is lack of public information on each amendment and that voters choose not to vote therefore, or cast their ballots indifferently.

GUIDELINES FOR CONSTITUTIONAL CHANGE

The following guidelines for constitutional change were offered by the 1967 National Governors' Conference Study Committee on constitutional change:

1. The state constitution should express only fundamental law and principle and omit procedural details except, of course, for procedural provisions in the Bill of Rights.

2. Outmoded, obsolete detail should be removed from the constitution, and material relating to a common subject should be placed in the same article.

3. A constitutional commission composed of persons representing the public as well as government is the best instrument for studying and recommending revisions under (1) and (2) above.

4. Revision of the executive, legislative, and judicial articles should be made on the basis of a "whole article" rather than a piecemeal approach.

5. The legislature should be permitted to meet in annual sessions of unlimited length.

6. More authority, fiscal and otherwise, should be granted to local governments, in order to allow governors and legislatures to concentrate on state problems.

7. The amendment process should be liberalized to allow legislatures to submit more amendments of greater scope and with more frequency; submissions of whole articles dealing with the same subject would permit more rapid constitutional improvement.

8. One of the most challenging areas of constitutional reform in the fiscal article, which is often a jungle of lengthy and tangled provisions and restrictions; this article should have high priority in revision, and the legislature should be allowed the widest possible range of tax and appropriation alternatives.

9. There should be provision, in addition to legislative option, for placing before the voters at stated intervals the question of whether a constitutional convention shall be called; voters should also have the power, through

the initiative process, to call a convention and propose amendments.

METHODS OF CONSTITUTIONAL CHANGE

Purpose of State Constitutions

Americans have viewed their constitutions not only as statements of law, but also as symbols of their highest political ideals. As symbols, constitutions should receive the support and respect of all the people. The need for widespread citizen understanding and appreciation of our constitutional tradition has never been greater than today. Nor has the need been more important than for general citizen interest and participation in current political affairs.

Citizen involvement measures the vitality of a democratic system. Constitutions may contribute to citizen involvement, first as symbols of our political ideals, and second, by providing political systems simple in detail and without unnecessary complications in the way they function. If the people are to respect and take an interest in their government, they must understand it. If they are to participate, they must know how to participate and to feel their participation can be meaningful.

Constitutionally, the federal system involves two levels of government, federal and state. Each level has an authority independent of the other; each has its own functions and responsibilities. The Kestnbaum Commission report to the President of the U. S. in 1955 pointed out that state constitutions contribute to the weakening of the states in our federal system by restricting the scope, effectiveness and adaptabllity of the respective state and local governments. These "self-imposed" constitutional limitations make it difficult for many states to provide all of the services their citizens require and consequently are often the underlying causes of state and municipal pleas for federal assistance. Recent studies identify these weaknesses and others in Montana state and local government. A Montana Legislative Council study in 1968 concluded that less than one-half of the provisions of the 1889 constitution are adequate for present needs.

Changing State Constitution

There are essentially three methods of achieving comprehensive constitutional revision:

1. Constitutional conventions

2. Proposal of a new constitution by the legislature

3. Major revision of the constitution through comprehensive amendments.

All three methods require voter ratification of the proposed changes.

A prominent feature of constitutional revision in the 1960's is the use of constitutional study commissions. These commissions are created to serve as information, recommendation, and preparatory bodies for all three methods of comprehensive constitutional revision. There have been constitutional study commissions in 44 states and Puerto Rico. The six states that do not or have not had constitutional study commissions are: Arizona, Colorado, Iowa, Mississippi, Nevada, and Wyoming. Twenty-seven states and Puerto Rico have formed constitutional study commissions since 1960. Montana's 16-member Constitution Revision Commission was created by the 41st Legislative Assembly. Members were appointed for two-year terms beginning April 1, 1969, and the Commission will publish a written report to the 42nd Legislative Assembly prior to September 1, 1970.

Conventions

Since Massachusetts first employed the constitutional convention in 1780, at least 215 such bodies have been convened in American states. Traditionally, their primary purpose has been to write new constitutions, or to revise existing ones. In recent decades, however, the conventions have been used increasingly to propose more limited constitutional changes in the form of one or more amendments when other methods were inexpedient or unauthorized. The constitutional procedure for calling a convention in most states requires submission of the convention question to the electorate before enactment of enabling legislation by the legislative assembly. The referendum calling a convention may limit the convention to considering specific areas of the constitution or permit the convention to consider the entire document.

Since 1950, 11 states have voted to hold constitutional conventions. They are: Virginia, New Hampshire, Rhode Island, Maryland, New York, New Jersey, Pennsylvania, Arkansas, New Mexico, Tennessee, Illinois. Six states are now scheduled to vote on the question of calling a constitutional convention. They are Massachusetts, Montana, North Dakota, Oklahoma, and Iowa in 1970 and Tennessee in 1971.

Since 1940, 18 unlimited constitutional conventions have been held in 13 states and Puerto Rico. Of these states, eight approved new constitutions, four approved the amendments that were submitted, and two states will vote on proposed constitutions in the 1970 elections. There have been ten limited constitutional conventions in five states since 1950. Eight have voted on the proposed revisions, and one, Tennessee, will vote in 1971. Of 38 amendments proposed by limited conventions, all but four have been adopted.

Number Of States Voting On Calling A Constitutional Convention

Since 1950, 11 states have voted to hold Constitutional conventions.

Virginia	1956
New Hampshire	1962
Rhode Island	1964
Maryland	1966
New York	1966
New Jersey	1966
Pennsylvania	1967
Arkansas	1968
New Mexico	1968
Tennessee	1968
Illinois	1968

Since 1950, 10 states have rejected the call to hold a Constitutional Convention.

Oklahoma	1950
Iowa	1950, 1960
Ohio	1952

Pennsylvania	1953, 1963
New York	1957
Louisiana	1956, 1957
Michigan	1958
Kentucky	1960, 1966
Utah	1966
Vermont	1969

Six states are scheduled to vote on the question of calling a Constitutional Convention.

Massachusetts	1970
Montana	1970
North Dakota	1970
Oklahoma	1970
Iowa	1970
Tennessee	1971

Number Of Constitutional Conventions

a. unlimited constitutional conventions

Since 1940, unlimited 18 Constitutional Conventions have been held in 13 states and Puerto Rico. Of these states, eight approved the new constitutions submitted by the convention, four rejected the new constitutions, four approved the amendments that were submitted, and two states will vote on proposed constitutions in the 1970 election.

Name of State	Date of Convention	Result of Convention Adopted
Missouri	1943-44	Yes, 1945
New Jersey	1947	Yes, 1947
Hawaii	1950	Yes, 1950
Puerto Rico	1951-52	Yes, 1952
Alaska	1955-56	Yes, 1956
New Hampshire	1956	3 amendment submitted and adopted, 1956

Continued-

Name of State	Date of Convention	Result of Convention
		Adopted
New Hampshire	1958	1958 3 amendments submitted and adopted, 1960
Michigan	1961-62	Yes, 1963
New Hampshire	1964	8 amendments submitted and 5 adopted, 1964
Connecticut	1965	Yes, 1965
		Rejected
Rhode Island	1964-68	No, 1968
New York	1967	No, 1967
Maryland	1967	No, 1968
Hawaii	1968	Yes, 1968
New Mexico	1969	No, 1969
Arkansas	1969	To vote in 1970
Illinois	1969	To vote in 1970

b. limited constitutional conventions

Limited Conventions have been held in five states. Eight have voted on the proposed revisions and one, Tennessee, will vote in 1970.

They are:

Name of State	Date of Convention	Results of Convention
Rhode Island	1951	8 amendments submitted and 6 adopted, 1951
Tennessee	1953	8 amendments submitted and adopted, 1954

Continued- Name of State	Date of Convention	Results of Convention
Rhode Island	1955	3 amendments submitted and 1 adopted, 1955
Virginia	1956	1 amendment proclaimed by the convention
Rhode Island	1958	2 amendments submitted and adopted, 1958
Tennessee	1959	1 amendment submitted and adopted, 1960
Tennessee	1965	9 amendments submitted and adopted, 1966
New Jersey	1966	1 amendment submitted and adopted, 1966
Pennsylvania	1967	5 amendments submitted and adopted, 1968
Tennessee	1971	

Proposal of New Legislative Constitutions

There are five states in which the legislature has approved a new constitution and submitted it to the voters. They are: Georgia, 1945; Florida, 1968; Virginia, 1970; Oregon, 1970, and Idaho, 1970. A new constitution proposed by the legislature of Virginia will be placed before the voters in the 1970 general election. Voters in Oregon rejected the constitution proposed by the legislature.

Comprehensive Amendments

Although Amendments are a common and perhaps most used method of constitutional revision, they are generally piecemeal and slow. However, a number of states have recently made use of comprehensive amendments to accomplish major revision. Among them are: California, 1966; Colorado, 1968; Massachusetts, 1966; New Jersey, 1966; Pennsylvania, 1967 and Wisconsin, 1967.

III

A CONSTITUTIONAL CONVENTION

A constitutional convention is truly a people's convention, a convention in which the people of the state exercise the ultimate power of government.

While every citizen is familiar with the regular departments of state government--the legislative, the executive and the judicial, knowledge concerning the nature, purpose and use of a constitutional convention are often vague. Yet, the constitutional convention is as much a part of our governmental processes and institutions as these other divisions.

CALLING A CONVENTION

Only the people can decide whether to call a convention. If a majority of the people approve Referendum 67, the calling for a constitutional convention, at the general election in November, 1970, the legislature will enact legislation to establish a convention. The purpose of this legislation, an "enabling act", is to provide for the selection of delegates, to make an appropriation for the necessary expenses of a convention and to set the date and length of the convention.

The total cost for holding a constitutional convention is estimated at approximately $600,000, less than $1.00 per capita or less than one-third the cost of a legislative session. This includes an appropriation for the election of delegates, pre-convention research and planning, compensation of officers, members and employees of the convention, printing of the convention's proposals and the election for ratification or rejection of the convention's proposals. This cost could be more than justified by the savings that could result from a streamlined constitution free of 19th century detail.

In 1866, Montana's first constitutional convention lasted for six days. A second convention convened in 1884 and remained in session for 54 days. Montana's present constitution was drafted in 1889 at a third convention which lasted 42 days. A two month time limit for the convention would seem adequate, in view of this historical experience as well as the tradition of 60-day legislative sessions. This time limit would be determined by the legislature.

Purpose

The purpose of a convention is to make a comprehensive study of the constitution and to propose revisions, alterations or amendments that are necessary.

Organization

In the process of accomplishing this task a convention passes through three distinct but overlapping phases. The first phase is that of organizing the convention. The first steps in the organization of the convention include calling the convention to order and swearing in the delegates. Next, officers are elected, a set of rules adopted, and the delegates are assigned to committees. The second phase involves the work of the committees. Their proposals and recommendations are then passed onto the floor of the convention for the third phase debate and decision making.

Procedure

Ideas and subjects offered for the convention are expressed in and introduced to the convention as "proposals". Formal proposals originate from two major sources--the committees and individual delegates. Probably the most comprehensive proposals will come from committees, since they will be assigned whole subject matter areas within the constitution; however, individual delegates may make proposals from the floor of the convention. The delegates may submit proposed amendments which are referred to committee for consideration or may offer proposals as substitutes for those coming from a committee.

A citizen petition is another method of introducing ideas or subjects to the convention for its consideration. Petitions

differ from proposals in that they may be submitted by non-delegates and need not be specifically worded. Citizens and civic groups may use this method to introduce ideas and to make their desires and thoughts known to the convention. After submission, these petitions are referred to the appropriate standing committee according to subject matter. The committee will then take the petition under consideration and, if acceptable, the idea or subject matter which it expounds will be specifically worded and incorporated into a committee proposal.

The final consideration of all issues rests with the convention as a whole, but the preliminary work, initial decisions, and some tentative compromises must be worked out in committees. Committees undertake studies of the subject matter areas now in the constitution or which should be placed in the proposed document, such as the bill of rights, the three branches of government, local government, the tax structure, and the amending process.

Each proposal and petition introduced to the convention is referred to an appropriate committee for consideration. Committees hold public hearings on these proposals to provide an opportunity for interested citizens to testify. If a proposal is found satisfactory and comprehensive, it is then approved by the committee and submitted to the whole convention for consideration. If a proposal is not approved, it may be amended by the committee. The amended proposal is submitted to the convention as a committee proposal.

As soon as a committee is ready, it presents its recommendations to the convention and debate on proposals and proposed amendments may begin. The convention may give tentative approval at this time, action may be postponed for a definite or indefinite period, or the matter may be referred back to committee for further consideration. If tentative approval is given, the proposal is sent to a committee on style and drafting for review and possible rewriting of its constitutional language. Following this review the proposal is returned to the floor for approval. At the end of the convention a comprehensive draft of all approved proposals is prepared and presented to the convention for its final approval. These "revisions, alterations or amendments" constitute the recommendations of the convention.

APPROVING OR REJECTING THE CONVENTION'S RECOMMENDATIONS

Only the people can approve or reject the convention's recommendations. The final step in the process of constitutional revision is the submission of the convention's recommendations to the voters for ratification or rejection. The constitution requires that the convention schedule an election for the purpose of ratifying or rejecting any proposed revisions, alterations or amendments. The convention may submit its recommendations in the form of a comprehensive draft of a revised constitution or it may submit several separate proposals to be voted on individually. But in either case, before any recommendations approved by the convention can take effect, they must be approved by a majority of the voters.

IMPLEMENTING THE RECOMMENDATIONS APPROVED BY THE PEOPLE

Among the convention's recommendations, it is necessary to provide for a smooth transition from the previous constitutional provisions. These transitional provisions allow time for the legislative, executive and judicial branches of government and local governments to implement the new constitutional provisions. The transition schedules may provide for separate effective dates for various portions of the recommended changes.

IV

ISSUES FOR A CONSTITUTIONAL CONVENTION

INTRODUCTION

> ". . .many State constitutions restrict the scope, effectiveness and adaptability of State and local action. These self-imposed constitutional limitations make it difficult for many States to perform all of the services their citizens require, and consequently have frequently been the underlying cause of State and municipal pleas for federal assistance. . ."
>
> Commission on Intergovernmental Relations, "A Report to the President for Transmittal to Congress" (1955)

The purpose of this section is to stimulate independent thinking, and not to draft a proposed constitution. To the extent that a convention and the rest of us are well-informed, we shall avoid needless controversy, both in the writing of a new constitution and later in the voting on it.

As to a Constitutional Convention, ours could benefit from Montana's 81 years' experience under the present Constitution and be in the advantageous position of examining:

1. the studies of the Montana Legislative Council and the Montana Constitution Revision Commission;

2. amendments that have been proposed to the Montana Constitution;

3. the constitution of 49 other states;

4. the recent work of constitutional conventions in other states.

It should also be stressed that the work of a Constitutional Convention is not final. It is not the final authority on what will be or not, the constitution of Montana. The final authority is the voter.

The Constitutional Convention only has the authority to review the entire Constitution and to propose "revisions, alterations, or amendments." It must then submit the proposals to the voters for ratification or rejection.

The Montana Legislative Council presented, in 1968 after nearly two years of study, the conclusion that in many places of the Montana Constitution there are "provisions which invite subterfuge, provisions which are archaic, provisions which are ambiguous, provisions which are statutory, and provisions which place serious limitations on effective state government."

The topics introduced in this section are: What Is A Constitution, The Purpose of a State Constitution, The State Bill of Rights, Suffrage, The Legislature, The Executive, The Judiciary, Local Government, Public Finances and Education.

WHAT IS A CONSTITUTION?

"A constitution states or ought to

state not rules for the passing hour,

but principles for an expanding future."

Justice Benjamin Cardozo

Constitution - An American Invention

When the Founding Fathers of the United States, the first

democratic republic of modern history, desired to write their ideas about government on paper, they found few guidelines. Even Great Britain had no written constitution and does not have one, even today. Concepts abounded--in the Colonial charters, in French assemblies, in the Mayflower Compact, in the Declaration of Independence. But the framers of the Articles of Confederation were doing something new in the history of governments--putting basic principles, powers, and limitations into written, binding form.

"That to secure these rights, Governments are instituted among men, deriving their powers from the consent of the governed" was a ringing statement that proved a challenge to get it translated into a structure of government. And Americans demanded the protection of a written document as they embarked on the great adventure.

Early State Constitutions

The first state constitutions were drawn before there was a true federal government. Further, the states were mindful of their experiences of subjugation under the English monarchy and they were proud of their independence. They were careful, therefore, about delegating powers in the Articles of Confederation other than those involving defense and essential cooperative services.

The fledgling states also used colonial experiences rather than the model of the mother country and thus were influenced by the thinking of American leaders--John Adams, R. H. Lee, James Madison, George Mason, and John Dickinson. Strong philosophical opinions on separation of powers, universal suffrage, individual liberty, and governmental stability were thus reflected in the early state constitutions. Later, the states surrendered many powers to the federal system, but their pride in having existed previous to the formation of a national government affected American politics for many years, even to the concept of retaining state sovereignty.

In 1789, the U. S. Constitution went into effect as a response to the needs of the time and was expanded by the Bill of Rights developed largely out of complaints from the states who wanted protection in writing from the centralized government they were accepting.

State Constitutions Today

The trend toward more authority at the national level of government has been going on ever since that time of the original 13 states. The intensity of this trend ebbs and flows with economic-political conditions, but the gradual development of a strong central government has changed from the original concept of federalism as one in which states grant powers to a central government. Now it is the states which demand more and more from the national government in part, as a result of population shifts and expansion, development of problems (such as transportation) which ignore state lines and state solutions, interpretations by the U. S. Supreme Court of the powers granted to national government, emergence of spheres of action not anticipated by those who drew the U. S. Constitution, desire by most states to assign problems to the national level and, especially in recent years, the inability or unwillingness of states to cope with problems at the state level.

Many observers and students claim that today's state constitutions are generally overly-detailed, products of the last century. For one, they try to describe all the functions left to the states by our federal constitution, which is written with simplicity, and contains statutory provisions which should not have been frozen into constitutional law. Many mistook the purpose of a constitution by trying to write protections against every contingency, from officials to "greedy" warehousemen.

PURPOSE OF A STATE CONSTITUTION

Criteria for a State Constitution

If one assumes that states are to continue as partners in a federal system, one must assign high priority to a state constitution which will permit effective action by the state. This raises questions. What are the characteristics of such a document? What criteria can be applied to its development and evaluation?

First, definitions of the functions of a state constitution. Generally, there is agreement that the purpose of a constitution is to set forth the principles of government, establish the elements of a structure of government, distribute powers, and define relationships.

There are also philosophical functions: to preserve American tradition, to establish conditions under which the traditional concept of the importance of the individual can operate, to generate confidence in the people, to encourage participation of the people in their government, to give continuity to the American commitment, to implement the American dream--all are mentioned by scholars.

There is a contemporary function: to create a mechanism which can and will function in the solution of current problems.

Listed below are some of the criteria for a state constitution suggested in current literature. A discussion of each may suggest ways of refining standards of judgment.

1. A constitution is fundamental law, not a set of ordinary statutes. What are fundamentals? What is minimum amount of detail necessary, for example, to describe separation of powers? suffrage? relationship between branches of government?

2. A constitution is founded on majority rule with protection of the minority. What channels are provided for expressions of opinions and what protections to the minority are needed in a constitution?

3. Checks and balances are necessary to maintain our form of government. What is meant by checks and balances? Do these ever interfere with responsive government?

4. A constitution is flexible and permits response to new problems and conditions. What language provides for flexibility? How is the amendment process related to this criterion?

5. A constitution should be simple with few details. By details are meant specific rules and regulations or for example, extensive descriptions of functions of local government. But how do details appear? What effect do details have on court decisions? on public understanding? on initiative and creativity of state officials? on speed of response to problems?

6. A constitution should be written in simple language, easily understood by the people and clear as to intent.

7. A constitution should be reasonably easy to amend. What is the purpose of amendment? How easy should amendment be? Who should be involved in the amendment process? What precautions are necessary?

8. A constitution should make provision for coping with current and emerging problems and anticipate as many needs as possible. What kind of problems lend themselves to constitutional solutions? What general approaches can be developed to give latitude for new situations?

9. A constitution should make clear assignment of responsibility without erecting barriers between and among departments or without creating obstacles to new response patterns. What general statements of responsibility can meet these criteria?

10. A constitution must equip the state to assume and execute its responsibility as a state in the federal system. What provisions can be made to fit the state for this role? What kinds of problems are now involved?

THE STATE BILL OF RIGHTS

"A bill of rights is, in a very real sense, an expression of political faith and ideals--it set the bounds of political authority and reserves to the individual certain freedoms believed essential to human happiness. It guarantees protection for those areas of individual

difference necessary for the operation of popular government and political democracy.

"Civil Rights and Liberties" A staff paper for the Alaska Constitutional Convention.

THE DECLARATION OF RIGHTS reflects the theories of a free people and lessons of history.

State bills or declarations of rights largely reflect political ideas of the 17th and 18th centuries, ideas which found their most dramatic expression in the Declaration of Independence, the Virginia Bill of Rights of 1776, and the Bill of Rights of the United States Constitution. Behind these declarations is a proud heritage that may be traced to the historic English Magna Carta of 1215 and colonial declarations of 1765 and 1774. In keeping with this tradition, the people will want to reconsider periodically their civil liberties, expanding these as new concepts of human rights are accepted, and modifying those time-honored but perhaps obsolete practices that fail to meet the challenges of the day.

Today when both national and state governments are involved in the daily life of the citizen, a bill of rights may have added importance. Complex economic, social and international developments have brought government at all levels into intimate contact with the citizen both at work and at play. Thus at a time when the improper use of governmental power through huge bureaucracies is a real and not an imagined threat, many experienced observers feel that a strong bill of rights is vital. It may serve as a restraint upon government officials as well as upon the whims of transient majorities who, in the face of vast domestic and international strain, may be tempted at times to ignore basic rights.

THE DECLARATION OF RIGHTS is a statement of the people and serves the purpose of protecting the citizens' civil liberties.

The Montana Declaration of Rights contains three fundamental features:

1. A statement of political theory on the purposes of government;

2. Provisions on the substantive rights of expression (speech, press, religion, assembly, petition) and property rights;

3. Provisions on the procedural rights of persons accused of criminal acts or involved in civil proceedings.

Most citizens are generally familiar with the guarantees of individual freedom in the Bill of Rights of the United States Constitution. However, not all of the provisions of the Federal Bill of Rights are applicable to the state governments. Until the ratification of the Fourteenth Amendment to the United States Constitution, the Bill of Rights was construed to restrict only the federal government. Thereafter, however, the Supreme Court has held that certain rights protected in the Bill of Rights are so "fundamental" and "implicit" in the concept of ordered liberty that the "due process" clause of the Fourteenth Amendment mandates that state governments, as well as the federal government, obey them. Thus, for example, the First Amendment guarantees freedom of religion, speech, press and assembly, and the Fourth Amendment's protection against unreasonable searches and seizure have been held to regulate state, as well as, federal action. On the other hand, the Fifth Amendment protection against double jeopardy and the right to indictment by a grand jury and the Seventh Amendment right to trial by jury in all civil cases have been held not to apply to the states. Therefore, in these latter cases the states are free to impose their own limitations. Thus a state needs a Declaration of Rights in its Constitution.

A second reason advanced often for a strong state declaration of rights is the responsibility of the states to enlarge upon the protections in the federal constitution. The states are closer to and more directly responsible for the protection of individual freedom and property. There have been many suggestions lately that the states can resist the expansion of federal power and revitalize their own governments by playing a more immediate and active role in providing for the welfare and security of their own citizens.

THE MONTANA DECLARATION OF RIGHTS is adequate in its present form, but should be reviewed.

While the Montana Constitution prescribes the guarantees in the areas of freedom of speech, press and religion and assures defendents the fair administration of justice, the Constitutional

Convention may want to consider that the changing circumstances and complexities of our times effect these basic liberties. An example of this is in the area of wiretapping and electronic eavesdropping, and rights of privacy. This subject is not now, according to experts, covered in the constitutional guarantee against unreasonable searches or seizure at either the state or federal level. The tapping of telephones is banned by federal law, but both national and state officials recognize that wiretapping in its various forms does, in fact, go on. Limited and restricted use of listening devices is advocated by many lawmakers since modern communication techniques and its use by criminal elements present a particular dilemma to law enforcement officials. Yet the right of privacy must also be protected.

A CONSTITUTIONAL CONVENTION will also consider, in all probability, inclusion of a guarantee of civil rights regardless of race, color, religion, national origin or ancestry, as is included in the Michigan Constitution of 1964. There is no written guarantee in the Montana Constitution that civil rights shall be extended to all men regardless of race.

SUFFRAGE

"All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Montana Constitution, Article III, Section 5

SUFFRAGE PROVISIONS are the major tool of citizen control of government.

The state constitution should firmly protect the essential political rights of the citizen, leaving to legislation, within a broad constitutional framework, responsibility for prescribing details of the electoral process.

The assumption that the broadest possible participation in the electoral process is good is fundamental to democratic theory. Few would argue with the statement that all who have the capacity should be permitted to participate in the selection of public officers and in the making of public policy. The argument will come over what constitutes "capacity." In general however, it is important that voter qualifications be clearly and immediately related to the exercise of the franchise and specifically dealt with in the constitution. Age and residence are the most obviously reasonable bases for qualifying voters. Citizenship, literacy and absence of criminal record, and sanity have also been widely accepted.

SUFFRAGE PROVISIONS regarding residency requirements should be reviewed.

Under the Montana Constitution a person is qualified to vote for all officers and on all questions, except questions concerning "the creation of any levy, debt or liability," if he:

1. has attained the age of 21 years;

2. is a citizen of the United States,

3. has resided in this state for one year.

Local residence requirements are determined by the legislature and currently the law provides that all qualified voters of the state who have resided in the city or town for six months and in the ward for thirty days are entitled to vote at any municipal election.

The Presidential Commission on Registration and Voting Participation created in 1963 compiled a list of 21 standards for voting requirement. Among these the Commission recommended that:
1) state residence requirements should not exceed six months,
2) local residence requirements should not exceed 30 days, and
3) new state residents should be allowed to vote for the President.

The Montana Legislative Council concluded that state residence requirements should be set at six months and local residence requirements should be fixed by statute rather than by constitutional provision.

The Model State Constitution of the National Municipal League suggests that a constitution should set a maximum local residency requirement of three months and that the legislature be permitted to establish minimum periods of local residence such as county, town or election district residence.

Proponents of a reduced residency requirement argue that a three month requirement seems justified in an era of extremely high population mobility combined with rapid means of communication whereby voters may quickly inform themselves of the issues and thus meet the criterion of awareness.

SUFFRAGE PROVISIONS regarding the taxpaying requirement is in violation of the Supreme Court's interpretation of the United States Constitution.

A Constitutional Convention would be able to consider the taxpaying provisions as qualifications for voting in elections. These qualifications are applicable only to elections on local bond issues, tax levying, and bond and tax levying issues for school districts. In June, 1970 the United States Supreme Court handed down a decision declaring taxpaying provisions as a qualification for voting in any national, state or local election as unconstitutional. In view of this decision, the taxpaying provisions, although they will remain in the Montana Constitution until repealed, may not be used as a voting qualification.

SUFFRAGE PROVISIONS regarding age qualifications should be reviewed.

The traditional voting age is 21 years, but four states have established lower age limits--two old states, Georgia and Kentucky, at eighteen and the two new states, Alaska, nineteen, and Hawaii, twenty. Most agree that it is nearly impossible to prove that one age is better than another, however some arbitrary line must be drawn with respect to age. While neither 21 nor 18 is a magic number, a choice will have to be made. The really pertinent question concerns whether the younger voter would have sufficient maturity, interest and awareness to appreciate the significance of the process in which he is engaging.

Montana voters will be voting on a constitutional amendment lowering the voting age to 19 in November, 1970. In addition, Congress has recently passed legislation lowering the voting age to 18 for all national, state and local elections. This new

law's constitutionality, however, has not yet been tested in the courts. Undoubtedly the outcome of the vote on the Montana Constitutional amendment and of a court case testing the constitutionality of the new national law will provide direction for a Constitutional Convention in Montana as it considers this question.

A CONSTITUTIONAL CONVENTION would provide the opportunity for each of these questions to be publically discussed and considered. It will be the responsibility of the delegates to the convention to examine in detail these problems to try and find solutions to them and to offer those solutions in a modern constitution that will stand the test of many years in the future.

THE LEGISLATURE

"The people don't control the legislature; the constitution does. The constitution not only restricts the legislature's power to enact laws, but also severely limits the time which the legislature has to consider the problems of Montana."

James P. Lucas, Speaker
Montana House of Representatives

LEGISLATIVE PROVISIONS written into the Montana Constitution in 1889 are inadequate today.

The Montana Constitution may have created a weak legislature which is unnecessarily hampered by constitutional rules governing its procedures and constitutional restrictions on its powers. Some think, too, the constitution curbs the legislature in its crucial role of law-making and policy determination and thus the constitution also curbs the power of the people whom the legislature represents.

LEGISLATIVE PROVISIONS may not allow sufficient time for the legislature to manage the state's business.

The paramount restriction on the legislature is the constitutional limitation on the length and frequency of legislative sessions. The economy of a 60-day biennial legislature, originally set when Montana was still a territory:

1. may result sometime in hastily drawn bills;
2. does not always provide adequate time for committee consideration, public hearings or formal action on bills;
3. creates an atmosphere sometimes difficult for calm consideration;
4. does not allow time for many interested citizens to become informed on the work of the legislature;
5. can make the legislature more susceptible to pressure group lobbying;
6. generally may lower the quality of legislation approved by the legislature.

Consistently, the volume of legislative business has required the legislature to extend beyond the present 60-day constitutional limit. Attempts to reduce legislative delay, such as early introduction of bills, have not substantially increased the time necessary to complete the legislative business of the state.

LEGISLATIVE PROVISIONS regarding the structure and apportionment of the legislature should be reviewed.

The Montana Constitution provides for a bicameral legislature, does not limit the size of either house, and provides that the legislature shall "revise and adjust the apportionment for representatives and senators" on the basis of each Federal Census. The Constitutional Convention may consider a constitutional limit on the size of the legislature, the number of districts, and the advisability of a two-house legislature.

LEGISLATIVE PROVISIONS contain numerous provisions which are statutory rather than fundamental.

Statutory detail in the Montana Constitution includes provisions on the structure and duties of state administrative agencies, procedures for the administration of state funds, regulations of corporations, structure and procedure for county government, method of selection and removal of judges, and administration of property tax assessment. All of these areas are statutory in nature and are subject to the need for frequent amendment and revision. Montanans could be served better if statutory provisions were provided for by statute instead of being frozen into the constitution.

Some experts claim that the Montana Constitution has been enlarged to an indefensible length by the inclusion of these statutory provisions, and as a result the idea of a constitution as fundamental law and a foundation of government has been lost from sight.

A CONSTITUTIONAL CONVENTION could consider improving the legislature. A convention could remove those sections that impede the legislature from doing its work effectively and responsibly and add to the expense in both time and money. Many procedural rules now in the constitution could be provided for by House and Senate rules adopted by the legislature.

THE EXECUTIVE

"As it is now, the chief executive cannot truly govern or administrate. One of the means of changing this would be through executive reorganization in conjunction with constitutional revision."

Governor Forrest H. Anderson

EXECUTIVE PROVISIONS hinder responsible and efficient functioning of the executive branch of government.

In our democratic society an executive branch of government should be organized with two main objectives: 1) It should be politically responsible to the people through the election process, and 2) it should be organized to perform with maximum effectiveness and efficiency the tasks assigned to it by the legislature. Both of these objectives--responsibility and efficiency--are prevented, often by an executive branch of sprawling and uncoordinated agencies.

EXECUTIVE PROVISIONS create a fragmented executive structure beyond the effective control of the people, the legislature, or the governor.

The Montana executive-administrative branch of government consists of over 160 officials, boards, bureaus, and commissions. Even though the governor is vested with the supreme executive power of the state and it is his duty to see to the faithful execution of the laws, the actual number of independent officers, boards, bureaus and commissions which have little or no direct connection to the governor's office often prevents the governor from providing effective leadership in state government.

A CONSTITUTIONAL CONVENTION could consider improving the quality of state government by making executive and administrative agencies, boards and commissions responsible to the governor as the chief executive of the state. This would not only strengthen state government by providing some insurance that the governor's and legislature's policies would be carried out, but it could improve citizen control over state government.

THE JUDICIARY

"The judicial system designed for Montana in 1889 is not adequate for Montana in

1970. Our court system was designed for the days of slow transportation and simple problems, not for today."

James T. Harrison
Chief Justice, Montana Supreme Court

JUDICIAL PROVISIONS written into the Montana Constitution in 1889 contain the basic framework for the court system in Montana.

The Montana Constitution provides for a three level court system consisting of the Supreme Court, district courts and justice of the peace, police and municipal courts. There are five Supreme Court justices, elected on non-partisan ballots. At the district court level 18 districts have been established with 28 district judges elected on non-partisan ballots. There are also approximately 230 justices of the peace and police judges elected on partisan ballots.

JUDICIAL PROVISIONS in the Montana Constitution need to be reviewed.

Our nation and state have witnessed in recent years a loud and persistent cry for reform of the judicial machinery of government. There is little dispute about goals. "Equal justice under law" expresses the highest ideal of our democratic society. All institutions and activities of democratic government ultimately rest upon a foundation of respect for law, and respect for law cannot exist without an effective and impartial judicial system.

The main emphasis of the judicial article of a state constitution should be on the establishment of a unified judicial system, free from a mass of separately established courts. The judicial article should contain only those provisions necessary to create the state court system, assure its independence and provide for its effective and efficient operation. Constitutional creation of a number of different courts, along with the definition of their jurisdictions, leads to a variety of difficulties. Court reform often becomes either a matter of piecemeal constitutional amendment, or is not attempted at all because of the difficulties involved in integrating existing courts into any kind of rational scheme.

JUDICIAL PROVISIONS regarding the inferior courts are inadequate; they have prevented the development of small claims courts for Montana citizens.

The shortcomings of the justice courts and police courts are becoming increasingly severe. Following is a summary of the problems facing these courts:

1. A multitude of courts and judges. At this court level alone, 230 people are involved in dispensing justice.

2. Lack of training and skill. The overwhelming majority of justices of the peace and police judges have no legal training and some do not have the knowledge to decide on many problems presented.

3. Lack of court rooms and facilities. Most justices of the peace and many police judges have no court rooms and hold court in kitchens, offices, grain elevators, garages and other places of business.

4. The fee basis of compensation. The majority of justices of the peace are paid a fee for each case they handle. Since a law enforcement officer generally has a choice between at least two justices of the peace in any case, he may choose the judge to whom he takes the matter and who, therefore, receives the fee. This creates problems of income and power.

5. Incompleteness of civil jurisdiction. Justices of the peace have legal jurisdiction over cases involving smaller sums (up to $300) but the reports indicate that few such cases are ever handled. This appears to be due to the intricacy of the court procedures, the necessity for hiring legal counsel at an expense which is prohibitive, and lack of faith by prospective litigants in the capacity of these courts. Legal authorities say a small claims court would improve access to the judicial system for persons with minor civil cases.

JUDICIAL PROVISIONS regarding the selection and tenure of justices need reviewing.

The recruitment as well as retention of outstanding men and women to staff the courts is among the basic requirements of a sound judicial system. The National Municipal League states that state

constitutional provisions governing selection and tenure of judicial personnel are among the more severely criticized sections of state constitutions.

The Model State Constitution of the National Municipal League strongly criticizes the practice of selecting judges through direct elections. It is pointed out that there is considerable, if not unanimous, agreement that an appointive judge is preferable to an elective one because it enhances judicial independence. Also, a judicial candidate cannot--and usually does not--run for office in the same manner as candidates for legislative and executive office. Moreover, the attributes that make for good judicial qualifications and temperament are not appropriate subjects for meaningful public debate or for a considered vote of the electorate. The election of judges is thus commonly based on irrelevant considerations such as party label (even in non-partisan elections) rather than on any considered judgment as to qualifications for judicial office.

There have been a wide variety of alternatives to direct election of judges on one hand or executive appointment on the other. For example, the "Missouri Plan" is a compromise which provides, in essence, that judges be appointed by the governor from a list of nominees provided by a nominating commission and, thereafter stand for re-election against their records in non-competitive elections. The "Missouri Plan" is only one of many alternatives, which could be considered by a Constitutional Convention. Ideally, the convention would remove any constitutional roadblocks to the legislature adopting, if it sees fit, the so-called "Missouri Plan", or some variant.

A CONSTITUTIONAL CONVENTION could review all proposals for changing the structure and procedures of the judicial system which have come from the legal profession, the Montana Legislative Council, and the general public. In summary, a Constitutional Convention could consider:

1. the establishment of a two-level court system as opposed to the three-level system currently provided for, or modernization of the three-level system;

2. the establishment of a small claims court system and procedure;

3. justices of the peace, police and municipal courts;

4. improving the quality of all legal proceedings to the district court level;

5. permitting the expansion of the number of Supreme Court justices to seven;

6. providing for a system of administration within the court system;

7. vesting the legislature with authority to provide for the election or other method of selection of justices and judges;

8. allowing for the appointment, rather than the election, of the Clerk of the Supreme Court and the clerks of the district courts;

9. permitting the legislature to provide for censure, suspension, removal, or retirement of justices and judges, in addition to the present methods of impeachment;

10. considering the provision about election of county attorney and that the legislature may provide for district attorneys.

LOCAL GOVERNMENT

"The people ask the mayor and council to take care of cities and towns, but in too many cases the aging state constitution won't let them do the job properly. No mayor or council is free to always choose the course best suited to their particular community because of constitutional restrictions."

John McLaughlin, Mayor of Great Falls
President, Montana League of Cities and Towns

"County government is increasing, not declining, but the constitution does not give county officials the authority they need to meet new problems. Few people are aware that an outmoded constitution, more than anything else, is responsible."

Burt L. Hurwitz, County Commissioner,
Meagher County
President, Montana County Commissioners
Association

LOCAL GOVERNMENT is denied control over their own affairs by the Montana Constitution.

The Montana Constitution prevents effective local control over local government by vesting authority over local government in the state legislature. Also, it prevents the legislature from providing effective financial aid to cities, towns and counties, and contains many restrictions on the powers of local governments. Stripped of the freedom to act in purely local matters, cities, towns, and counties have often been forced to encumber the legislature with a maze of bills of a local nature.

Local government is increasing in importance, but if local government in Montana is to cope with the impact of the new federalism, its basic legal authority must be studied and a proper framework developed.

LOCAL GOVERNMENT on the county level is denied legislative powers that are permitted municipalities.

The constitution denies to our counties the legislative power that is permitted municipalities. Counties are performing an increasing number of functions of government. Many functions once considered properly those of municipal corporations are now, even in rural areas, performed by special districts created by counties.

The number and variety of functions varies from one county to the next, but in recognition of the evolution of functions performed now by many of Montana's counties, the constitution should free the legislature to delegate activities to whichever unit of local government is best capable of performing the local service.

LOCAL GOVERNMENT is becoming a burden to the legislature due to constitutional restrictions.

Under existing law, there exists a state-local relationship in Montana in which all units of local government have had to justify every action by reference to provisions of law defining both powers and procedures. As a result, the legislature is burdened with a maze of local government bills, and for local government in Montana, statutory law has become a voluminous and intricate handbook, sharply inhibiting the response of local government to local needs.

A CONSTITUTIONAL CONVENTION would permit the writing of a local government article that could clearly state that it is the intention of the people to vest in local government maximum freedom to deal with local affairs. At the same time, the article could leave unimpaired the power of the legislature to enact laws of statewide or regional concern. The convention could specifically authorize cooperative agreements between units of local government and provide for a grant of residual power to all units of local government. By approving such a provision, the delegates in convention could in effect require future legislatures to distinguish local matters that are of statewide concern and subject to state law and those matters of local government that can best be handled at the local level. As a result, local government would exercise any legislative power not denied it by general law. This concept of shared powers would mean that local governments, both counties and municipalities, would be free to act on any problem unless definite state action had been taken. Such a streamlined article on local government would free the legislature of the burden of acting on a host of purely local bills so that it can concentrate on matters of importance to the whole state and would free counties and municipalities to deal effectively with matters of local concern.

"Some of the fiscal problems facing state and local governments today stem from failure of the states to remove constitutional and statutory limitations that circumscribe their freedom of action. It is often because of these limitations that state and local governments turn to the national government for assistance."

- Commission on Intergovernmental Relations, "A Report to the President for Transmittal to Congress" (1955)

FISCAL PROVISIONS written into the Montana Constitution in 1889 are inadequate today.

The ability of the state to administer its financial affairs is hampered by constitutional provisions regarding budgeting, appropriation of funds, expenditure of funds, audit of expenditures, assessment of property, authorization of taxes, and investment of funds. For the most part, these provisions should be statutory matters, rather than procedural arrangements frozen into the constitution.

FISCAL PROVISIONS are the most complex sections existing in the Montana Constitution.

The complexity of the fiscal provisions is illustrated by extensive court cases interpreting the language of the financial sections. The extensive and ambiguous financial provisions in the constitution have frequently forced the Supreme Court, rather than the legislature, to become the policy-making body in the area of state and local finance.

FISCAL PROVISIONS are a principal limitation on the ability of the state to provide efficient, economical and necessary public services.

Financial limitations severely restrict the governor, legislature and local government from providing necessary public services financed adequately by an equitable tax structure. These constitutional restrictions rely heavily upon the powers of the legislature to tax, appropriate money, to incur and finance debt and to establish an administrative structure necessary to exercise these powers.

FISCAL PROVISIONS in the present Montana Constitution are often outmoded.

Many constitutional financial provisions contain outmoded approaches and procedures that are costly and inefficient. Many of these financial provisions and procedures could be provided for by law, rather than being fixed in the constitution.

In its simplest form, the problem of what to include in the constitution on taxation and finance is a test of one's belief in our system of representative democracy. It is difficult to reconcile a constitution containing a series of prohibitions and limitations upon the legislature's exercise of discretion in respect to taxation and finance with a real belief in representative democracy.

A CONSTITUTIONAL CONVENTION would afford the people an opportunity to clarify the present provisions on finance, consider increased discretion in the legislature over state finance, and at the same time retain adequate safeguards for the people's interest.

EDUCATION

". . .provision shall be made for the establishment and maintenance of systems of public schools, which

shall be open to all the children of said states, and free from sectarian control"

The Enabling Act (Congressional act providing for Montana to be admitted to the Union)

EDUCATIONAL PROVISIONS in the Montana Constitution contain the basic framework for the public school system.

The people of Montana, in 1889, embedded in the state constitution the clear responsibility of the Legislative Assembly "to establish and maintain a general uniform and thorough system of public, free, common schools."

The Montana Constitution also provides for a state board of education and a state superintendent of public instruction with powers and duties to be regulated by statute. The constitution contemplates the creation of school districts, provides safeguards for the earnings from federal land grants and permanent school funds, prohibits the use of public funds for any school controlled in whole or part by any church, limits the indebtedness of school districts to five percent of the value of taxable property in each district and provides for county superintendents of schools.

EDUCATIONAL PROVISIONS need to be reviewed.

In general, the educational provisions of the constitution are regarded as satisfactory, but a Constitutional Convention would want to consider several recommendations that were made by recent official studies. Some specific areas which might be reviewed are:

1. Superintendent of Public Instruction. Several studies have suggested that the superintendent of public instruction should be an appointive office of the state board of education, rather than a political elective office. In 26 states, state superintendents of public instruction are now appointed by the state board of education rather than elected.

2. County Superintendent of Schools. The Constitutional Convention could review the role and function of the constitutional office of county superintendent of schools. In some counties, it is virtually impossible to persuade anyone to serve as county superintendent of schools. If the office were removed from the constitution, the legislature could then provide by statute for the qualifications, status, and role of the county superintendent.

3. Separate Governing Board for the University System. The convention could consider establishing separate governing boards for the university system and the public schools. A Montana Legislative Council study showed that the Board of Education devotes only five percent of its time to primary and secondary education.

4. Constitutional Investment Restrictions. The convention could also examine the effects that constitutional investment restrictions have on the earning of the public school funds. The constitutional guarantee of the school funds against loss or diversion could be retained, but the present constitutional restrictions on investment of public school funds adopted in 1938 could be modified to permit the legislature to provide by law for sound investment and management of these public funds to produce the maximum amount of income.

5. Constitutional Limitations on Bonded Indebtedness. The constitution limits bonded indebtedness to five percent of the taxable valuation of a school district. Since valuations are not uniformly determined, the five percent debt limitation itself is not uniform, and financing of school construction is limited in counties where assessment ratios are low. The present constitutionally imposed debt limit does not provide a uniform protection to taxpayers because its effect is dependent upon the varying practices of the several county assessors. The convention could consider replacing debt restrictions with an authorization for the legislature to supervise the level of school district and other local debt.

A CONSTITUTIONAL CONVENTION would provide an opportunity to review the state's responsibility to provide for a system of public education. The present constitutional provisions could be evaluated and the necessary and desirable improvements be recommended by the convention to the people for their approval.

Referendum No. 67

Secretary of State's Statement

Referendum No. 67 was introduced as Senate Bill 297 in the Forty-first Session of the Montana Legislative Assembly and passed the Senate by a vote of thirty-seven (37) to eighteen (18). The House vote was seventy (70) to twenty-eight (28) in favor and the bill was signed by the Governor on February 21, 1969.

Attorney General's Explanatory Statement

This referendum would authorize the 1971 state legislature to call a constitutional convention to revise, alter, or amend the present state constitution. The calling of such constitutional convention by the state legislature shall be done pursuant to the procedures set forth in Article XIX, section 8 of the Montana Constitution. After a constitutional convention is called, there shall be an election in the state to select representatives to the convention. The convention shall meet within three (3) months after such election to prepare the necessary revisions, alterations or amendments to the state constitution, which shall then be submitted to the electors of the state for their approval or rejection.

Title of Bill

AN ACT TO SUBMIT TO THE ELECTORS OF THE STATE OF MONTANA THE QUESTION WHETHER THE LEGISLATIVE ASSEMBLY SHALL CALL A CONSTITUTIONAL CONVENTION.

Section 1. At the general election to be held in November 1970 there shall be submitted to the electors of the state of Montana the question whether the legislative assembly at the 1971 session, and in accordance with Article XIX, section 8 of the Montana constitution, shall call a convention to revise, alter, or amend the constitution of Montana.

☐ For calling a constitutional convention.

☐ Against calling a constitutional convention.

MONTANA *Constitutional Convention* COMMITTEE

117 North 27th Street • Billings, Montana 59103 • Phone (406) 252-8441

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